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No. 89-1052 (2)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

THREE BUOYS HOUSEBOAT VACATIONS
U.S.A., LTD., *Petitioner*,

v.

HARVEY G. MORTS, et al.,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

On August 2, 1987, at approximately 1:30 a.m., a 20 foot speedboat operated by an employee of petitioner, collided with a houseboat that had its lights on and was anchored out of the channel of Lake of the Ozarks, killing two and injuring other persons on board.

Petitioner seeks to limit its liability to $250.00, by applying the Limitation of Liability Act. 46 U.S.C. 183, *et seq.*

The Lake of the Ozarks lies entirely within the State of Missouri. No vessel on Lake of the Ozarks can navigate across a state line.

SUMMARY OF THE ARGUMENT

A writ of certiorari should not be granted because there is no conflict between the circuits or between any courts regarding the jurisdictional scope of the Limitation of Liability Act, and because whether or not admiralty jurisdiction exists for Lake of the Ozarks is a matter of strictly local concern. Petitioners raise only moot or settled issues.

ARGUMENT

Petitioner asks that the Limitation of Liability Act be applied wherever there is Commerce Clause jurisdiction. Petitioner's argument was rejected one hundred years ago. To accept it now would have disastrous results. Petitioner presents no reason for making such a fundamental change.

Federal admiralty jurisdiction is the basis of authority for the Limitation of Liability Act. Territorial application of the Act is necessarily coextensive with the existence of admiralty jurisdiction. This has long been the rule. See, Norwich Co. v. Wright, 80 U.S. 104 (1871); The Main v. Williams, 152 U.S. 122 (1894).

In Butler v. Boston & Savannah Steamship Co., 130 U.S. 527 (1889), the

Court said:

> "The law of limited liability, as we have frequently had occasion to assert, was enacted by Congress as a part of the maritime law of this country, and therefore it is coextensive, in its operation, with the whole territorial domain of that law."

Id., at 555. Also:

> "It is clear, then, that the law of limited liability of ship owners is a part of our Maritime Code, the extent of its territorial operation (as before intimated) cannot be doubtful. It is necessarily coextensive with that of the general admiralty and maritime jurisdiction, and that by the settled law of this country extends wherever public navigation extends--on the sea and the great inland lakes, and the navigable waters connecting therewith."

Id., at 557.

The purpose of the Limitation of Liability Act, to encourage investment in ship building by limiting the potential liability of investors, is now satisfied by the use of corporations and insurance. The Act is disfavored, and

its further expansion is inveighed against. Maryland Casualty Co. v. Cushing, 347 U.S. 409, 437 (1954).

The history of the development of and the interplay between the Commerce Clause and the Admiralty Clause as a basis for jurisdiction is discussed in Frankfurter, The Commerce Clause Under Marshall, Taney and Waite (1937, reprinted 1964); Stolz, Pleasure Boating and Admiralty: Erie at Sea, 51 Calif. L.Rev. (1963); and Note, From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century, 67 Harv. L.Rev. 1214 (1954). In the course of that development, the Limitation of Liability Act was made to depend upon admiralty jurisdiction and not upon Commerce Clause jurisdiction.

That the Limitation of Liability

Act depended upon admiralty jurisdiction and not upon Commerce Clause jurisdiction was decided in In re Garnett (The Katie), 141 U.S. 1 (1891). This case should be considered in light of effect that the 1886 amendments to the Act had upon the reasoning of the Court in Lord v. Goodall, Nelson & Perkins Steamship Co., 102 U.S. 541 (1881). The arguments and issues, and their disposition, in In re Garnett are more apparent when reference is made to the lower court's decision, The Katie, 40 F. 480 (S.D. Ga. 1889), and to the annotations of the parties' briefs in the Lawyers Edition report of the Court's decision. 35 L.Ed 631.

Given the *de minimis* effect requirement for commerce clause jurisdiction, Wickard v. Filburn, 317 U.S. 111 (1942), and given the statutory defini-

tion of vessel as any artificial contrivance capable of being used as a means of transportation on water, 1 U.S.C. 3, if the Limitation of Liability Act were to be applied wherever there was commerce clause jurisdiction, the Act would apply broadly even to pleasure boats on small municipal lakes and reservoirs. Applying the Act so broadly does not further the proper accommodation of state and federal interests in this type of water related activity. Such activities should be governed by the respective states, and not be made federal cases.

The argument that the Limitation of Liability Act provides federal question jurisdiction in the absence of admiralty jurisdiction, should not be considered because even if such jurisdiction exist-

ed, the ultimate result would be unchanged: that the Act does not apply to injuries such as in this case that occur outside of admiralty jurisdiction, *i.e.*, on waters such as Lake of the Ozarks that are not capable of sustaining interstate navigation. The question of the federal question jurisdiction is academic, and should be reserved for a case where it is in controversy.

CONCLUSION

Respondents request that the petition for writ of certiorari be denied.

RESPECTFULLY SUBMITTED.

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